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NOTES.

THE POLICE POWER AND THE FOURTEENTH AMENDMENT TO THE CONSTITUTION.—In the recent case of *Lockner* v. *The People of the State of New York*, decided April 17th, 1905, The Supreme Court of the United States has declared unconstitutional a law of the State of New York making unlawful the employment of persons in a bakery for more than an average of ten hours daily, or for more than sixty hours in any one week. Four Justices of the Court dissent from the opinion of the majority. The law is declared to be in violation of the Fourteenth Amendment to the Constitution of the United States. In widening the interpretation of the scope of the term "liberty," therein contained, to include the liberty to labor, and in defining the right to contract to be property of which the individual cannot be deprived without due process of law, the decision is perhaps a landmark.

The Fourteenth Amendment to the Constitution was not designed to interfere with the police power of the States. *Barbier* v. *Connolly* (1884) 113 U. S. 27. Under certain conditions both the liberty and the property of the individual may be subjected to an exercise of that power. What the police power of the State is, however, the Supreme Court has never attempted exactly to define. The term itself is of ancient origin, and in the Greek State designated the entire internal affairs of government. In the middle ages it designated the affairs of the manor as the powers of the barons, and distinguished them from the powers of the monarch in the entire state. The assumption later by the monarch of all governmental powers restored the term to its original conception. 1 Burgess, Political Science and Constitutional Law, 214. This conception, making the police power identical with the entire internal affairs of a State, seems at first to have been accepted by the Supreme Court. *City of New York* v. *Miln* (1837) 11

Peters 102. But the later case of *Barbier* v. *Connolly*, supra, excepts from the power the power to fix and administer private rights. It leaves the police power therefore but a branch of the internal government, and essentially administrative. The scope of the power, considered objectively, was next limited, and confined to the enactment of laws designed for the protection of the public safety, morals, health, and welfare; and is further limited to conditions reasonably requiring its exercise. *Crowley* v. *Christensen* (1890) 137 U. S. 86. The narrowing of the scope of the police power is therefore the trend of its history. Burgess, supra, p. 216. But the public "welfare" still offers a broad field for legislation designed for its protection; and the decision in the principal case is a distinct step toward confining the operation of the power to the public "safety, health, and morals", and restricting its operation for the public "welfare" to instances already included within them.

But the Supreme Court has gone even further in abridging the police power of the States. It has been the settled policy of that Court heretofore to regard the legislature as in the first instance the judge of the conditions requiring an enactment, and to declare a statute unconstitutional only when the opinion of the legislature was plainly and palpably unreasonable. *Mugler* v. *Kansas* (1887) 123 U. S. 623. This policy has been so repeatedly reaffirmed as to seem to give the Court a self-imposed jurisdiction. *Jacobson* v. *Massachusetts* (1904) 197 U. S. 11. The same policy has been pursued by the Court in considering statutes enacted under the police power in violation of the interstate commerce clause. *Atlantic and Pacific Telegraph Co.* v. *Philadelphia* (1903) 190 U. S. 160. 4 COLUMBIA LAW REVIEW, 371. 5 COLUMBIA LAW REVIEW, 298. In the light of preceding opinions of the Court sustaining statutes of so nearly a similar nature, *Holden* v. *Hardy* (1897) 169 U. S. 366, and holding them to be within the police power, Mr. Justice HARLAN, in his dissent, is undoubtedly right in saying that the present statute is not so clearly unreasonable in its nature as to be without that power.

The key-note of the spirit prompting much of such legislation is struck by Mr. Justice HOLMES in his dissent, and alluded to by Mr. Justice PECKHAM in the majority opinion. It is the economic theory of paternalism. While the Fourteenth Amendment to the Constitution did not nationalize civil liberty, *Slaughter House Cases* (1872) 16 Wal. 36, it conferred upon the individual those rights against the States which he already had against the national government. Burgess, supra, 227. It but embodies a principle of our organic law, a basic principle of democracy, that the civic liberty of the individual must be secure from the tyranny of government. Of this principle the police power is the counterpart; it secures the public against the selfishness of the individual. But only in so far as the public needs to be secured should the police power prevail. Hence the rule that in every instance the conditions must reasonably require an exercise of the power. In a particular instance the conditions justify the exercise of the power by the legislature. And as on the question whether or not the use of the power is justified depends the constitutionality of such use, it would seem that the Supreme Court were right in saying that this question must in every instance remain a judicial one.